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of *Akikunnissa Bibi* v. *Rup Lal Das* (1), to which we have been referred, does not appear to be on all fours with the present case. In this case the defendants' failure to have all their witnesses in attendance on the 5th October is said to have been due to a belief, induced in them by the previous procedure of the Munsif in the case, that there was no chance of all their witnesses, who were present, being examined on that day, and, as we are unable to hold that the belief of the defendants in that respect was not reasonable, we differ from the Subordinate Judge, and are of opinion that the Munsif failed to exercise a wise and sound discretion when he refused to grant the application for an adjournment for one day only, in order to secure the attendance of the absent witnesses. It is impossible for us with the facts before us to say that the evidence of the witnesses who were not examined could not have effected the merits of the case, and we are unable therefore to hold that the error or irregularity of the Munsif is covered by the provisions of s. 578 of the Code of Civil Procedure.

Until the defendants had had an opportunity of examining all their witnesses the questions of the legality and due performance of the alleged marriage also could not be satisfactorily determined.

We consider, therefore, that the judgments and decrees of the Lower Courts cannot be maintained. We accordingly set them aside, and direct that the suit be remanded to the Munsif with directions to give the defendants reasonable opportunity and assistance to secure the attendance of their witnesses, and, after **[53]** examining the witness who may be produced, to dispose of the case on the whole evidence in view of the remarks contained in this judgment. Costs to abide the result.

Having regard to the view we have taken of the appeal, no order is necessary in the rule.

Appeal decreed ; *case remanded.*

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PRESENT :

Lords Hobhouse, Macnaghten and Lindley, Sir Richard Couch and Sir Henry De Villiers.

MOUNG THA HUYIN (*Defendant*) *v.* MAH THEIN MYAH AND ANOTHER (*Representatives of plaintiff*).

[28th June and 21st July 1900].

[*On appeal from the Special Court of Lower Burma at Rangoon.*]

Partnership—Account ordered on dissolution decree—No abandonment by plaintiff—Effect of managing partner's not having kept clear accounts—Mode of taking account.

However speculative the subject matter of a partnership may be, it is a matter of inference, to be drawn from the facts of the case, whether there has or has not been an abandonment by a partner of his share ; or loss thereof consequent upon his refusing or neglecting to take his part in the business, and allowing a length of time to elapse in such circumstances.

Where the evidence was that the plaintiff, now suing for a winding up of a partnership and an account, had, some years before his suit, declined

(1) (1898) I. L. R. 25 Cal. 807.

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to advance more money for the business, and had left, with some subsequent intervention by him, the management to his co-partner now defendant:

***Held*, that there was no sufficient ground for the inference that the plaintiff had abandoned, or lost by laches, his position as a partner before this suit was brought.**

The defendant, on the other hand, while managing partner, had been engaged in dealings in timber peculiar to himself, in the same quarter as the partnership dealings and on a larger scale. His agent in the timber district had expended largely, but on which of the accounts it was impossible for the Court to distinguish. It had been possible for the defendant to have given full accounts of certain of his transactions, but he had not done so. He had mixed up his own separate dealings with those of the partnership, and had not kept clear accounts.

***Held*, that the Courts below acted rightly in disallowing all charges made by the defendant that were disputed by the plaintiff and were unsupported by vouchers notwithstanding that there might have been certain expenses disallowed which had been honestly incurred.**

[54] APPEAL from a decree (26th April 1899) of the Special Court of Lower Burma, affirming a decree (7th April 1898) of the Judge at Moulmein.

The defendant, appellant, was a trader in timber at Moulmein. The respondents represented the plaintiff, Koe Moe, who died during this suit; which was for accounts to be rendered, and for the winding up of a partnership into which the plaintiff had entered with the defendant by written agreement of the 20th October, 1885, for the purpose of advancing money to Moung Shoay Hpaw, deceased, at the date of the suit, on the security of logs which he mortgaged in transit down the Salween river from the forests. The terms of the partnership, the shares, and the proportionate contributions of money, appear in their Lordships' judgment, where all the facts are stated.

The principal questions on this appeal related to whether the partnership had continued down to this suit, and as to whether the principle on which the account had been taken was correct.

The plaint, filed 30th March, 1896, alleged that the defendant, as administrator of the estate of the deceased, Moung Shoay Hpaw, the debtor to the partnership, had expended money, and had sold timber and elephants belonging to the deceased, and had refused to account for the proceeds. On the other hand, the defendant's answer, besides denying that the partnership had subsisted beyond 1887, alleged that the plaintiff had refused advances necessary for the business, and had left it, with the defendant's consent, in that year.

Upon the issue of dissolution by mutual consent there were concurrent decisions of both the lower Courts in the negative. The question of the dissolution before suit was, however, again raised. The consent was not again urged, but reliance was placed in the plaintiff's having declined to advance more money in March 1887, and on his having left the management of the business to the defendant as showing abandonment of the partnership, or loss of his interest therein consequent upon his conduct. When, however, the question of whether there had been a dissolution before the suit had been decided against the defendant an appeal to the Special Court, the defendant was ordered, on the 1st June 1886, to file his accounts of the business of the partnership; with **[55]** the additional finding that it stood dissolved from the date of the suit. On the 5th August 1896 he filed two accounts: (1) a schedule showing the number and proceeds of logs of Moung Shoay Hpaw's estate from the 21st December, 1889, to 3rd June, 1895; (2) an account

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of the total expenditure in connection with the partnership business in Moulmein and the forests, amounting to nearly three lakhs and a-half.

The plaintiff filed objections to both the credit and the debit sides of this account. On the 17th May, 1897, the taking of the accounts was referred by consent to the Registrar of the first Court, who reported on the 5th November following. The Commissioner's principle, among others, in taking the account appeared as follows :—The plaintiff refused to admit, and the Commissioner disallowed, all payments by the appellant, which were neither supported by voucher, nor stated in his account-book to have been made on behalf of the partnership. Nor did he allow the advances said to have been made to the agents, and the disbursements made by Moung Galay, the defendant's brother and agent on the forests, who died about two years before this suit. The Commissioner's reasons were that "the appellant did not keep any proper, or any partnership, accounts, and was unable to state how much of the advances had been made on account of the partnership." Moung Galay kept no separate accounts of the business transacted by him for the partnership. The appellant "very candidly admitted that he treated the partnership business as his own, as though it were his own private business ; and, therefore, made no distinction between the two businesses in his accounts," according to the Commissioner.

The Judge accepted the report as the correct basis for his decree, which was that the defendant should pay to the plaintiff Rs. 50,835, with interest at the rate of 12 per cent. per annum, from 30th March, 1896, the date of suit. The decree appointed the defendant by consent a receiver of the unpaid portion of the debt due to the parties from the estate of Moung Shoay Hpaw deceased. This decree was made after a reference back for ascertainment of the value of some of the partnership assets, and for report of certain particulars which were considered before the decree was finally made on the 7th September, 1898.

[56] The Special Court affirmed this decree. The Judges were of opinion that the Commissioner in taking the account proceeded in all respects regularly. They said that it was out of the question in taking accounts that items unsupported by any evidence should be allowed. They found on the defendant's evidence and that of his witnesses that he kept no separate accounts of the partnership. As managing partner he should have done this. Also that there were presumably original materials which might have been produced by him, but were not produced ; and that on the documents produced it was impossible to distinguish between the partnership and the private accounts.

On this appeal,

1900, JUNE 28. *Mr. R. B. Haldane, Q. C.* and *Mr. J. W. McCarthy*, for the appellant, argued that the partnership was dissolved in March, 1887, as a consequence of the refusal of the plaintiff at that time to make further advances for the purpose for which the partnership had been formed by the written agreement of the 20th March, 1865. The defendant had become entitled to treat the partnership as dissolved, as the sole object of it was defeated by the plaintiff's having so acted in breach of his agreement. By the plaintiff's neglect to concern himself about the partnership business, and by allowing nine years to elapse before claiming any equitable relief from the Court, a case of laches on his part appeared which disentitle him to it. He had in fact abandoned his interest in the partnership. The inference from the plaintiff's acts and omissions could only

be that he had made his choice to bear a loss already incurred, and not to encounter the risk of the speculative transaction of advancing more money. To make that advance was, however, necessary for the continuance of the partnership business. The plaintiff having so acted could not now be allowed to alter his intention, and to insist on his partnership right down to the time of action brought. Thus he could not claim a decree for an account. As to the effect of a partner's acts of this character, *Cowell* v. *Watts* (1) *and Norway* v. *Rowe* (2) were referred to.

[57] Also were cited *Senhouse* v. *Christian* (3); *Prendergast* v. *Turton* (4); and *Maclure* v. *Ripley* (5); and Lindley on Partnership, Bk. III, Chap. 10, s. 3, at p. 475 of the 6th edition.

As to the principle on which the account had been taken the argument was that the Courts below had been wrong in disregarding the statement of the Commissioner that the appellant was entitled to some recompense for the "ounging" the logs, and for his agent's services. These expenses should have been considered. The Courts had also erred in rejecting every item in the account unsupported by vouchers, as thereby they had failed to recognize the practice in paying those employed in the timber traffic, where, from the necessity to make a number of small payments, in the forests, it would be impossible to obtain receipts in the ordinary way. To the substantive evidence of the defendant, that he had paid certain sums on behalf of the partnership, no weight whatever had been attached. The Courts had, moreover, treated Moung Galay as solely the agent of the defendant, whereas he had been the agent of the partners also, so that the liability for the agent's default should not fall on the defendant alone, in the matter of the agent's expenditure. Further, the amount allowed to the defendant for getting the timber down from the forests having been shown to have been insufficient, the latter had also been made, by the Courts' order, to pay in respect of partnership assets admitted not to have been yet realized.

Mr. Herbert Cowell for the respondent was not heard.

Cur. adv. vult.

1900, JULY 21. Their Lordships' judgment was delivered by— LORD HOBHOUSE.—The appellant in this case is the defendant below. The respondents are the representatives of the original plaintiff, who has died in the course of the suit. His death has not in any way varied the matters of dispute between the parties, who may for present purposes be conveniently styled plaintiff and defendant throughout.

On the 20th October, 1885, the plaintiff and defendant, who **[58]** resided at Moulmein, made a written agreement to advance Rs. 1,10,000 for obtaining 4,445 logs of teak timber which was therein stated to be lying in the Mhineloongyee forests and to have been hypothecated and delivered by the owner Moung Shoay Hpaw to the defendant as security for advances made by him. The parties were to advance the amount and to bear further expenses in the proportion of 3 shares to the plaintiff and 2 to the defendant, and the proceeds were to be shared in the same proportion. In the next year the partners advanced Rs. 30,000 more to the mortgagor in the same proportion. In point of fact the timber said to be delivered was in Siamese territory at a great distance from Moulmein, and it had to be dragged to and launched upon the River Salween, down which

(1) (1850) 2 H. & Tw. 224; 19 L. J.N. S. Ch. 455.
(2) (1812) 19 Ves. 144.
(3) (1755) Reported in a note to *Hart* v. *Clarke* (1854), 19 Beav. 356.
(4) (1841) 1 Y. & C. Ch. Ca. 98, and on appeal, 13 L. J. N. S. Ch. 268.
(5) (1850) 2 Mac. & Gor. 274.

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it must travel some hundreds of miles before reaching Kado, where the loose logs could be captured for their consignees.

In August, 1886, the mortgagor of the timber died, and the defendant was declared his administrator in the following October. After that it was found that more money was wanted to recover the timber, and the partners provided Rs. 20,000 in the stated proportions. In March, 1887, the defendant required Rs. 10,000 more to meet expenses, and the plaintiff declined to pay the two-fifths demanded of him. The defendant alleged in his written statement that the partnership was then dissolved by mutual consent.

In 1896 the plaintiff brought this suit to take the accounts and to wind up the partnership. The preliminary question was whether it had been dissolved in March 1887; and a separate issue was framed by the Judge of Moulmein to try that question. The plaintiff denied that there was any dissolution, or any abandonment by him of his interest in the concern, and said that he did not advance the money demanded because the defendant would not render any account of his dealings with the last advance. The defendant said that on the plaintiff's refusal he considered the partnership to be at an end; that the plaintiff gave no reason for refusal; that he, the defendant, made no further demand, and gave no notice to the plaintiff that the partnership was dissolved.

[59] Upon this evidence the Judge of Moulmein found that there had been no dissolution by consent; and on 1st June, 1896, he passed an order which declared that the partnership was dissolves as from that date, and ordered the defendant as managing partner to file accounts.

The defendant raised the same question again after the accounts were taken, both in the first Court and on appeal in the Special Court of Lower Burma. But he raised it in a different shape; not alleging mutual consent, but relying on the laches of the plaintiff, and his abandonment of the undertaking. There was, however, no more evidence of express abandonment than of consent, and there was some evidence of the plaintiff's subsequent intervention in the partnership affairs. So the defendant had nothing to support his plea except the fact that the plaintiff had declined to advance money in March, 1887, and had left the management of the business to the defendant, who filed three characters. He was mortgagee prior to the partnership, he was legal representative of of the mortgagor, and he was managing partner.

The Special Court held that they could not infer abandonment, and they maintained the judgment of the first Court on what they call this much-laboured and unsubstantial point. It has been laboured again with all the resources of able advocacy at this bar; but their Lordships have not been induced to doubt the soundness of the view taken by the Courts below. It is not necessary to enter again on an examination of the well-known class of cases exemplified by *Norway* v. *Rowe* (1). Even assuming in the defendant's favour that the subject-matter of this partnership is as precarious as a mining speculation, it is a matter of inference to be drawn from the facts of each case whether or no there has been abandonment, or loss of interest by laches. And there is no case, or at least none cited, in which the Court has held a partner to have lost his position on grounds so slender as those which exist here.

On coming to take the accounts great difficulties were found. Besides the various characters filled by the defendant, another **[60]**

(1) (1882) 19 Ves. 144.

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element of confusion appeared. He had dealings in timber peculiar to himself in the same quarter as the partnership dealings, and on a larger scale. His agent in the timber district was his brother Moung Galay, who had indubitably expended large sums of money, but on what account it was impossible to say. The defendant says: "I instructed my clerk to make an abstract of all my payments to Moung Galay, no matter on what account. I cannot distinguish the account on which the money was spent without Moung Galay's accounts. He never specified in his demands the purpose for which he wanted the money nor rendered accounts of his expenditure, although I asked for them. I did not discharge him because he was my brother and I knew he would not cheat me. I carried on the partnership as though it were my own business and kept no separate account for it.

Moung Galay is dead and no accounts are produced as coming direct from him. Perhaps if there were any they would not make matters any clearer, for the defendant tells us again: "I made payments to Moung Galay for my own business besides those for the partnership. Moung Galay never rendered accounts since Wahzoe 1252. The account I have filed (Abstract 4) was made up from an account furnished by Moung Galay and returned to him. In his account the expenditure on each business was not shown separately, but Moung Hpo Tsin and he went through the accounts and ascertained what had been spent on each business."

The Burmese year 1252 may be gathered from the documents to cover parts of the Christian years 1890-91.

The clerk, Moung Hpo Tsin, was examined, and tells us: "I wrote accounts marked 'copy of Moung Galay's accounts A and B.' Some of the entries were taken from Moung Galay's accounts, and some from defendant's cash books." Further he relates in cross-examination how Moung Galay brought an account book; how he and the clerk picked out items which the clerk copied into a book; how the account so prepared was taken to Mr. Thompson, who was advising the plaintiff with reference to settlement of the partnership affairs; and how Mr. Thompson rejected the account as confused. "The accounts now produced as copies of Moung Galay's accounts were written to make **[61]** matters clear for the purposes of the dispute between plaintiff and defendant." Further he says that Moung Galay "did some timber business for defendant a Maihan. He also looked after defendant's business with Pah Taw and Pan Nyo, and others. About two lakhs were sent up altogether to Moung Galay. In his demands he never specified the account for which the money was required. From 1252 when Moung Galay went up the second time it is impossible to distinguish the expenditure on the partnership business from the expenditure on other accounts."

From these statements it results that the accounts now put in are not those kept by the defendant nor those kept by Moung Galay. They are a hash of some books or papers belonging to Moung Galay and of others belonging to the defendant and of verbal statements by Moung Galay, put together for submission to Mr. Thompson and rejected by him as confused, and a re-hash of the same with some subsequent items for the purposes of the suit. They are doubtless tendered in good faith, for no attempt is made by the defendant to conceal their deficiencies or to claim for them more authenticity than they possess.

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The accounts were referred to a Commissioner, Mr. Bayly, whose report made in November 1897 shows that he went into the matter with much care. There was little difficulty on the receipt side. On the other side, owing to the lack of accounts and to the confusion between the defendant's private business and his executorship business and the partnership business, the Commissioner found himself compelled to disallow nearly all of the claims disputed by the plaintiff. He expressed an opinion that the defendant was entitled to some reasonable allowance for the services of his agents and for the expenses of getting the timber and of litigation connected with it and for interest on money advanced by him; but he thought he had no authority to decide such matters, and so he referred them to the Court. Subject to the Court's decision he found the plaintiff entitled to Rs. 50,835 1*a*. 5*p*. as his two-fifths share of the money received by the defendant for which he has not accounted.

On receipt of this report the Judge of Moulmein overruled some objections taken by the defendant, among which were **[62]** objections founded on the plaintiff's laches; but as to the Commissioner's recommendations the learned Judge could not discover any more materials for guidance than were in the hands of the Commissioner. He found the plaintiff entitled to Rs. 50,835 1*a*. 5*p*. and then sent the case back to the Commissioner for the purpose of ascertaining the value of the assets in items 9 and 10 of "statement 3, assets of the partnership" and also to ascertain from the parties what allowance they agree (as there is no evidence, and it is only by mutual agreement any allowance can be made) should be made for the services of the agents employed for the partnership business and for the expenses they (the agents) defrayed in "ounging" out the timber belonging to the estate of the deceased debtor, and in connection with the litigation in which the estate was involved; also the value of a set-off claimed by plaintiff.

This further reference came to nothing, because the parties could not agree. In reporting that result to the Court, the Commissioner added: "It is possible I consider for defendant to give if he chooses full details of his own private work that was carried on by the partnership agents, so as to enable me to allow a proper proportion of remuneration for the services of the agents in the partnership business; but he has not done this, although he has had ample opportunity both before me and the Court to do so, nor has he furnished such particulars of the ounging work, including the employment of the partnership elephants, as would also enable me to ascertain the cost of ounging the partnership timber."

After some further discussions and evidence, and after making an arrangement about the law suit in Siam, the case was brought again before the Judge of Moulmein, who delivered a detailed judgment explaining why he could not vary the prior conclusions. He made a final decree in favour of the plaintiff for Rs. 50,835 4*a*. 5*p*. with interest and costs.

On appeal the Special Court took the same view, confirming the judgment on the same grounds as were indicated by the Commissioner and by the two successive Judges of Moulmein. Their Lordships have nothing to do now except to say that the appellant's Counsel have wholly failed to persuade them, **[63]** that Court of Justice can properly arrive at any conclusion more favourable to the appellant. If it be true, as is earnestly alleged on his behalf, that expenses honestly incurred for the partnership have been disallowed to him, the answer is that by his

own acts in mixing up his private affairs with those of the partnership and his omission to keep clear accounts of any kind, he has made it impossible even to conjecture what those expenses are. Their Lordships will humbly advise Her Majesty to dismiss this appeal, and the appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *A. H. Arnold & Son.*

Solicitors for the respondent: Messrs. *Richardson & Co.*

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CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

GOBINDA PERSHAD PANDAY AND ANOTHER (*Petitioners*) *v.* G. L. GARTH (*Opposite Party*).* [27th March, 1900.]

Defamation—Proof necessary in charge of defamation—Penal Code (Act XLV of 1860) ss. 471, 499 and 500—Conviction of offence without charge—Re-trial, order of, by Appellate Court—Code of Criminal Procedure (Act V of 1898), ss. 232 and 423.

To constitute the offence of defamation as defined in s. 499 of the Penal Code, it is not necessary that the evidence should show that the complainant has been injuriously affected by such alleged defamation. The law requires merely that there should be an intent that the person who makes or publishes any imputation should do so intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person.

Where an accused was charged under s. 471 of the Penal Code of dishonestly using as genuine a false document, and the Magistrate convicted him under s. 500 of that Code of defamation, of which offence there was no charge framed against him.

***Held*, that the Sessions Judge, if he thought a new trial necessary, should have proceeded under s. 232 of the Criminal Procedure Code, under which an Appellate Court is competent to direct a re-trial, and not, as he did, under s. 423.**

[64] ***Quære.*** **Whether an Appellate Court has under s. 423 of the Code general power to order a new trial.**

IN this case on the 27th July complainant filed a complaint before the District Magistrate of Dacca, charging the accused with having, with intent to cause injury to complainant, used as genuine a certain letter which they knew to be a forged document. The offence of defamation was also alleged. The District Magistrate after a preliminary inquiry summoned accused under s. 471 of the Penal Code, and the case was sent to the Joint Magistrate for disposal, who, after hearing the witnesses for the prosecution, framed a charge under s. 471 of the Penal Code against the accused. Eventually the accused were convicted of defamation under s. 500 of the Penal Code, although no charge with regard to that section had ever been framed against them.

The accused appealed to the Sessions Judge of Dacca, who, on the 18th of January 1900, set aside the conviction of the accused under s. 500 of the Penal Code, and under s. 423 (*b*) of the Code of Criminal Procedure

* Criminal Revision, No. 95 of 1900, made against the order passed by S. J. Douglas, Esq., Sessions Judge of Dacca, dated the 18th of January 1900.